Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

KATHERINE GOMEZ,

Petitioner,

v.

DADE COUNTY SCHOOL BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a hostile environment retaliation claim, is jury deliberation on less-than-ultimate adverse employment decisions only allowed after meeting both the *prima facie* burden and an indeterminate and undefined "threshold level of substantiality"?

2. Is a retaliation claimant in a multiple-motive pretext case required to prove "untrue" each and every one of a defendant's numerous proffered non-discriminatory reasons for adverse employment actions before a jury is allowed to find a discriminatory reason was the motivating one?

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OPINIONS BELOW

The unpublished opinion and judgment of the court of appeals appear at Appendix ("App.") A and are cited at 181 F.3d 108 (11th Cir. 1999). The special verdict and final judgment of the district court appear at App. B, and are unreported. The unpublished opinion of the court of appeals denying petition for rehearing and rehearing en banc appears at App. C, and is unreported.

STATEMENT OF JURISDICTION

The court of appeals decided Petitioner's case on May 10, 1999, App. A, and denied Petitioner's petition for rehearing and rehearing en banc on September 17, 1999. App. C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2000e-3(a), which codifies section 704 of the 1964 Civil Rights Act, makes it an unlawful employment practice for an employer to discriminate against an employee

> because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

STATEMENT OF THE CASE

A. Proceedings Below

Pertinent here, Petitioner, Katherine Gomez, sued her employer, the Dade County School Board, in August 1996, under 42 U.S.C. § 2000e & 42 U.S.C. § 1981a, for, among other claims, hostile environment retaliation. R1-1-1-16. Petitioner alleged that she was subjected to hostile environment retaliation because of her complaints to her School Principal and higher authorities about a co-worker's "physical[ ] and verbal[ ] assault[on her]" that began on June 12, 1992. R1-1-2; R1-57-1. The School Board answered and asserted various affirmative defenses. R1-4-1-5.

The district court granted the School Board's motion for partial summary judgment on Ms. Gomez's disability discrimination claim (Count V) in October 1997. R1-20-1; R1-21-1; R1-22-1; R1-30-1; R1-43-1; R1-45-1; R1-48-1; R1-49-1; R1-51-1; R1-52-1; R1-53-1; R1-54-1; R1-57-1-11. Petitioner voluntarily dismissed her remaining counts, and tried solely her hostile environment retaliation claim. R1-1-66-1; R2-85-1; RS1-2-10-11.

Before trial, the district court granted the School Board's motion *in limine* to exclude Ms. Gomez's claims of unlawful employment practices occurring more than 300 days before filing her first, July 26, 1993 charge of discrimination. R2-73-1-7; RS2-1-139-25, R2-73-1-7; R2-90-1; RS2-1-139-25; RS1-2-133-4, 5-6, 7-8, 9-11, 14-15, 16; RS1-4-135-4-6, 9, 13, 21, 23; RS1-3-134-5, 7, 37.

On emergency of the district court judge, a United States magistrate judge tried the case with the parties' consent. R2-117-1. At trial, the court denied the School Board's Rule 50, Fed. R. Civ. P., motion and renewed motion for judgment as a matter of law. R2-98-1; R5-119-1-4. The School Board filed its proposed retaliation jury instructions and special verdict form, limiting retaliation to "ultimate" adverse employment actions. R2-78-1-16. Ms. Gomez filed her special verdict and amended proposed jury instructions, with no limitation on retaliation to "ultimate" adverse employment actions. R2-81-1-3; R2-82-1-27; R2-88-1-3; R2-93-1-27; R2-95-1-18.

After a four-day trial, the jury returned a no-liability verdict. R2-98-1; R5-119-1-4. The U.S. magistrate judge entered final judgment on the verdict on January 12, 1998, which Ms. Gomez timely appealed. R2-106-1-2; R2-116-1-3.

Ms. Gomez raised on appeal: (i) three erroneous or rejected, though requested, jury instructions and special verdict form on her hostile environment retaliation claim and (ii) the exclusion of evidence of Julian Rambo's sexual harassment of Ms. Gomez starting in June 1992. Initial Brief at 5. Ms. Gomez had filed, proposed and argued for her hostile environment retaliation jury

instruction during the charge conference. RS1-7-138-14, 16, 18. The court rejected it, instead amending Petitioner's proffered instruction to include the School Board's limitation on adverse employment actions to "ultimate" ones. RS1-7-138-14, 16, 18. Ms. Gomez also proffered her proposed verdict form, under the standards of *Hicks* and *Price Waterhouse,* which the court rejected, submitting the School Board's proposed verdict form instead. On May 10, 1999, the Eleventh Circuit affirmed per curiam the verdict and final judgment in an eleven-page, unpublished Opinion. App. A. The court of appeals denied Petitioner's petition for rehearing and rehearing en banc on September 17, 1999. App. C.

B. The Facts

1. The Instruction and Verdict Question at Issue in this Petition.

Ms. Gomez advanced the following hostile environment retaliation instruction, which the district court rejected:

> **PLAINTIFF'S AMENDED PROPOSED JURY INSTRUCTION NO. 16**
>
> ***Elements of Claim for Retaliation***
>
> In o[rd]er to prevail, Plaintiff must show that:
>
> (1) She engaged in an activity protected by Title VII,
>
> (2) Her exercise of her civil rights was known by the SCHOOL BOARD,
>
> (3) thereafter, the SCHOOL BOARD took employment action adverse to Plaintiff, and
>
> (4) there was causal connection between the protected activity and adverse employment action. R2-96-1, 19.
>
> * * *
>
> Ms. Gomez objected: "[The School Board's] Number 9, Your Honor. We ask our number 15 be given in its place."; "My instruction is more specific.

> It says the employer had to have known about it. . . . I meant number 16. 15 is the one that divides up the elements of the case."; "My 15 and 16 are different. I wanted the two. 15 just talks about the case. The other one goes on to describe what the elements of the case [are], so I think the different instructions are distinct."; "*There are different acts of retaliation.*" Initial Brief at 24-27; RS1-7-138-14, 16, 18 (emphasis added).

The court accepted the School Board's argument, but the Eleventh Circuit had already decide *McNely*:[1]

> that the Eleventh Circuit has not said what an adverse employment action is. The Fifth Circuit has. Ultimate employment decisions, which Title VII was designed to address include acts such as hiring, granting leave, discharge, promoting and compensation.
>
> * * *
>
> Not giving somebody a telephone to put on their desk is not an adverse employment action. RS1-7-138-17-18.

The court ruled:

> I will give [Ms. Gomez's instruction No.] 16 and that portion of [the School Board's instruction No.] 9. RS1-7-138-18.

The court instructed the jury that retaliation comprised solely "ultimate adverse employment decisions", rather than hostile environment:

> The plaintiff claims that the defendant, the School Board, retaliated against her for complaining of discrimination and filing charges of

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1. *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068 (11th Cir. 1996) (Eleventh Circuit looked to Title VII to find a jury instruction and verdict form to be correct that permitted recovery for adverse employment action short of termination under the ADA).

discrimination with the Equal Opportunity Commission.

That has been commonly referred to as the EEOC.

The defendant maintains that Mrs. Gomez has not been the subject of retaliation by the defendant or its employees.

In order to prevail, the plaintiff must show that, one, she engaged in an activity protected by Title VII, such as complaining of discrimination.

Two, her exercise of her civil rights was known by the School Board.

Three, the action of the School Board took employment action adverse as to the plaintiff, and,

Four, there was causal connection between the protected activity and adverse employment action.

The adverse employment action which the School Board took *must have been an ultimate employment decision such as hiring, granting leave, discharging and promoting and compensating.*

Hostility and threats from fellow workers do not substitute [sic] an ultimate employment decision so as to sustain a claim of retaliation. Initial Brief at 27-28; RS1-7-138-246; R2-94-9 (emphasis added).

Before the jury retired to deliberate, Ms. Gomez renewed her objections already "on the record". Initial Brief at 28; RS1-7-138-253.

Petitioner also filed the following amended request for special verdict, which the court rejected. R2-88-1-2.

RETALIATION CLAIM

Do you find by a preponderance of the evidence that the Defendant DADE COUNTY SCHOOL BOARD[ ] has retaliated against the Plaintiff KATHERINE GOMEZ? R2-88-1-2.

The Defendant proposed and the court ruled to submit the following special verdict:

> Has Katherine Gomez carried her burden to show that the School Board took an adverse ultimate employment action against her because she complained of discrimination (and if the School Board provides a non-discriminatory reason for its action, has Gomez shown that reason to be untrue)? R2-94-1; RS1-7-138-3-4.

2. *The Facts Triggering the Hostile Environment Instruction and Multiple-Motive Verdict Question.*

a. Brief Overview

Petitioner, Katherine Gomez, is a tenured Dade County Florida School Board employee. RS1-3-134-32-33, 50-51. She has worked as a School Board Audiovisual Specialist since 1978, responsible for all ordering, cataloging and maintenance of teaching tools, classroom equipment and School functions. RS1-3-134-32-33, 50-51. To do her job, she had keys to the entire School building and library, operated a computer and had access to a telephone to call supply vendors. RS1-3-134-32-51-52; RS1-3-134-42-43.

From 1978 until 1992, it was unrebutted Petitioner had no problems at work. RS1-3-134-33-34. And for the almost twenty years of her employment, no one has evaluated her work performance as unsatisfactory. RS1-3-134-50-51, 93; RS1-5-136-40.

Per the Court's *in limine* ruling, the evidence of Mr. Rambo's physical and verbal harassment of Ms. Gomez before November 1992 was excluded, and Ms. Gomez could only testify that she complained after November 1992 to her immediate supervisor about a co-worker, Julian Rambo, who harassed her with vulgar language. RS1-3-134-32-34.[2]

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2. Had evidence of Julian Rambo's pre-November 1992 sexual harassment been allowed, the jury would have seen the photographs of Ms. Gomez's injuries, proffered. RS1-5-136-118-19. The jury would (Cont'd)

b. Events Triggering Complaints Begin, but Do Not End, in 1992.

Petitioner complained to her Coral Park High School Principal, Mr. William Machado, about Mr. Rambo's sexual harassment of her. RS1-3-134-43-44. Mr. Rambo denied these allegations, so Mr. Machado concluded the charges were unsubstantiated. RS1-5-136-34-35. Mr. Machado "instructed [her] just to go back and do [her] job." RS1-3-134-43-44.

Petitioner continued to complain in writing to her then-Assistant Principal, Carnell White, and to Mr. Machado, about the alleged harasser to no avail. RS1-3-134-32-34-35. Still no change, Ms. Gomez, during 1993 and 1996, notified the School Board higher officials,[3] and the superintendent of the Dade County Schools. RS1-3-134-39-41, 44. Mr. Machado admitted Ms. Gomez "indicated that she felt there was some disparity in the area where she worked" and that she was having "difficulty with a colleague", Julian Rambo, making "her life unbearable", but Ms. Gomez "tended to make many complaints" about Mr. Rambo. RS1-5-136-27-29, 34-35.

Mr. Rafael Urrutia, director of the School Board EEO, testified that his and the School Board's EEO investigated Ms.

(Cont'd)
have heard corroborative testimony on Ms. Gomez's allegations in a 1992 Metro-Dade Police investigation, of record. RS1-5-136-127-29. The Metro-Dade Police noted in its report the School Board's Administration called them after Ms. Gomez's notice to the Administration. RS1-5-136-127-29. The jury would have further heard testimony that the investigating Police Officer observed:

> a large red mark and swelling on [Ms. Gomez's] left arm and redness around her neck and chest.

RS1-5-136-127-29. A jury would have also heard Mr. Rambo's admission to the Metro-Dade police that day he:

> walked in [Ms. Gomez's] office. [Ms. Gomez] turned around and [he] struck [her] accidentally [while throwing a] note in the wastebasket. R1-58-24.

3. Per the court's in limine ruling, Ms. Gomez was denied permission to introduce of all evidence of her complaints in 1992.

Gomez's allegations, and concluded all were unsubstantiated. RS1-7-138-127, 148-49, 162, 163-64, 175-78. Mr. Urrutia admitted that Mr. Machado and Mr. Legomin never relayed Ms. Gomez's written complaints of discrimination and retaliation to him. RS1-7-138-166, 179. He could not recall those interviewed for these investigations. RS1-7-138-127, 148-49, 162, 163-64, 175-78.

Mr. Legomin testified that any administrator having dealings with Petitioner had access to her personnel file. RS1-6-137-141. Ms. Leotha Courtney, certified legal assistant of the School Board's Attorneys' Office, admitted that Ms. Gomez's personnel file contained the discrimination charges and some discrimination complaints. RS1-6-137-106; RS1-7-138-124-25.

c. Evidence Triggering the Hostile Environment Retaliation Instruction and Verdict Question.

After her complaints about alleged harassment began in 1992, RS1-3-134-42-43; RS1-3-134-32-33, 50-51, Petitioner's job responsibilities were removed. RS1-3-134-42. Ms. Gomez's then-principal admitted at trial that they decided to eventually reduce Ms. Gomez's work responsibilities. RS1-5-136-33-34.

In May 1993, Mr. Machado admitted sending a memorandum to Ms. Gomez "direct[ing] her to submit ***all*** communications to [him] in writing." RS1-5-136-66-67, 69 (emphasis added). He did not send that same directive to Mr. Rambo, the alleged harasser, or any other employee at his school. RS1-5-136-66-67. Her desk was moved into the middle of the library floor, then moved to the end of the building. RS1-3-134-42-43. Mr. Rambo was officially moved to a desk in her same area; Ms. Gomez never saw him there. RS1-3-134-108-09.

Post-complaints, Ms. Gomez's unlimited access to the School building, RS1-3-134-42-43; RS1-3-134-32-33, 50-51, was limited. Her keys to everything, including the bathroom, were taken away from her. RS1-3-134-43, 106. Ms. Kelly admitted that her department denied Petitioner telephone access. RS1-6-137-4-6. Petitioner's department stated that it rescinded

Petitioner's telephone access because Petitioner had been rude about telephone calls and, on two occasions, those calling Petitioner had been rude to employees answering. RS1-6-137-4-6. Petitioner complained that her alleged harasser, Julian Rambo, threatened her with a knife. RS1-5-136-35.

The School Board, post-complaint, was now concerned about Petitioner's excessive absences. It was unrebutted that the School Board had never, before 1992, scrutinized or docked her time. RS1-3-134-66-67, 101-02. But Mr. Machado testified Ms. Gomez's "therapy for injuries", union activities and personal days, previously never contested, were now "excessive". RS1-5-136-36; RS1-5-136-51, 56-62. Petitioner was still rated "satisfactory" for every category, including attendance, computer skills, adherence to School Board rules, and punctuality. RS1-5-136-51, 56-62.

It was unrebutted that Petitioner had been a union steward for ten years. RS1-3-134-54-60, 66-67, 101-02. Pre-discrimination complaints — Petitioner's time for AFSCME union activities was not docked. RS1-3-134-54-60, 101-02. After she complained that she was sexually assaulted, the School Board docked and mis-classified Ms. Gomez's time for her day job from December 22, 1992 forward on two hundred and thirty-six (236) different occasions. RS1-3-134-54-77, 91, 109-11. Ms. Courtney admitted an employee's unused vacation days were compensable. RS1-7-138-115.

Mr. Machado did not dock the time of another union steward attending union business. RS1-5-136-75-77, 79. The School Board did not dock Petitioner's time from her evening job. RS1-3-134-91; RS1-3-134-96. Leotha Courtney, senior legal assistant for the School Board's attorneys' office, prepared for trial an extensive absence by absence analysis of Ms. Gomez's time from November 1, 1992 — after her first complaints of discrimination — until July 10, 1997. RS1-7-138-120-21. Ms. Courtney admitted that she "found some instances that [she, herself,] questioned". RS1-7-138-121.

Mr. Legomin, Mr. Machado's superior, admitted the School Board "always accomodate[d] the unions" and "always approved" union time as long as it was reasonable. RS1-6-137-133. Mr. Machado admitted that approved time should not be docked. RS1-5-136-75-77, 79. Ms. Courtney testified that Ms. Gomez had recorded absences, all post-discrimination complaints, of 404 days out of 1215 days and was docked for unauthorized time only. RS1-7-138-52-67, 74-103.

The union filed a grievance against Mr. Machado for these newly imposed restrictions on Petitioner's union activities. RS1-5-136-38-39, 77, RS1-3-134-99-100; RS1-6-137-132-33. Mr. Machado now wanted more lead time, "twenty-four hours" notice, for union activities. RS1-5-136-36-39, 63, 64, 65, 68-69, 76-77, 79-80, 84-86.

Ms. Gomez gave to her principals and assistant principals the requested notice of union activities requiring her attendance and of her Workers Compensation doctor appointments, with additional notice and clarification whenever requested. RS1-3-134-54-55-77, 80-81, 96-97, 101-03, 111-12, 129-31. Mr. Machado denied that. RS1-5-136-36-37. Ms. Sachs, who supervised Ms. Gomez when she was later transferred to Ruben Dario Middle School, admitted that Ms. Gomez's absences were often for union matters. RS1-6-137-61-65, 68, 69. Ms. Courtney admitted that Ms. Gomez had been injured on the job. RS1-7-138-114. Ms. Sachs admitted Ms. Gomez's absences were for treatment of her Workers Compensation injuries. RS1-6-137-61-65, 68, 69.

Ms. Courtney could not explain why she was not instructed to present Ms. Gomez's pre-discrimination complaints records, during that time when Ms. Gomez alleged the School Board did not misclassify or dock her time. RS1-7-138-120-21.

On July 26, 1993, after filing her first EEOC charge of discrimination and retaliation, she testified her work environment became more hostile. R1-3-134-42, 139. Mr. Machado was "well aware" that Ms. Gomez had filed an EEOC complaint. RS1-5-136-43, 49. Her supervisor at the time, Vivian

Pazos, had executed an affidavit in response to Ms. Gomez's EEOC 1993 charge of discrimination. RS1-5-136-74-75.

On September 23, 1993, Mr. Machado placed the sole responsibility on Ms. Gomez for the "operation and service" of the entire Audiovisual Department, including responsibilities within Mr. Rambo's "job description" plus those of five to six other employees. RS1-5-136-87-89. Mr. Machado could not recall why he did that. RS1-5-136-88-89.

In 1994, for reasons unrelated to do her performance, RS1-6-137-128, Ms. Gomez was directed to involuntarily transfer from the Coral Park Highschool to Ruben Dario Middle School. RS1-3-134-44-45; RS1-6-137-119; RS1-3-134-128; RS1-5-136-103-04, RS1-5-136-43-44, 87-89, 91-93; RS1-5-136-96, 99. Transfers, under the School Board policy, resulted in an employee being placed on a ninety (90) day probationary period. RS1-3-134-128; RS1-5-136-103-04.

Mr. Legomin said it was in the best interest of the District to transfer Ms. Gomez, rather than Mr. Rambo. RS1-6-137-129. Mr. Machado admitted that Ms. Gomez may have received more than twenty letters of recommendation from various individuals. RS1-5-136-43-44, 95-96.

Mr. Legomin testified that Petitioner's job at the Ruben Dario Middle School was "permanent". RS1-6-137- 42, 52; RS1-6-137-139-40. But Ms. Sachs shifted some of the other staff members' duties to Petitioner to create a position "temporarily" "in order for [Ms. Gomez] to have something to do". RS1-6-137-17-18, 42 70, 72. Ms. Sachs, Ms. Gomez's supervisor at Ruben Dario, testified her principal told her that Ms. Gomez "would be [at Ruben Dario] until they chose to put her somewhere else." RS1-6-137- 42, 52; RS1-6-137-139-40. Ms. Sachs, then-Media Specialist Supervisor at Ruben Dario Middle School, RS1-6-137-15-17, 41; RS1-6-137-41, 77-80, knew Ms. Gomez had a pending EEOC charge of discrimination against the School Board. RS1-6-137-15-17, 41; RS1-6-137-41, 77-80.

The involuntary transfer from a high school to a middle school changed Petitioner's work hours, caused her to work later in the day, and interfered with her Worker's Compensation doctor appointments for her on-the-job injuries. RS1-3-134-45, 138. At Ruben Dario, she worked straight from 8:00 a.m. to 3:00 p.m., skipping lunch, to attend her scheduled appointments. RS1-3-134-45, 53, 96, 98, 138; RS1-6-137-27. The School Board docked that time as vacation and sick leave, not authorized Worker's Compensation. RS1-3-134-45, 53, 96, 98, 138; RS1-6-137-27.

Previously *never* a problem before her 1992 complaints, Petitioner's new principal of Ruben Dario, Ms. Grimsley, testified she was also dissatisfied with Petitioner's attendance, conflicts with her co-workers, filling out time cards incorrectly, and changing her time cards altogether. RS1-6-137-144-50, 177. Petitioner testified Ms. Grimsley admitted the School Board's policy was to not dock time for these activities, but would do so anyway. RS1-3-134-54-58-59; RS1-6-137-171-75; RS1-7-138-189-90.

Ms. Sachs admitted that Petitioner did her job and got along satisfactorily with all at first. RS1-6-137-20-23, 26-27, 38-39, 47, 49, 53. Ms. Gomez, already injured, was further injured in one of their classrooms after Ms. Sachs had ordered her to clean equipment there. RS1-6-137-61-65. Ms. Sachs also admitted that Ms. Gomez complained that her staff was abusive to her, and that, in particular, Mrs. Faxus, a co-worker, was physically aggressive to her while Ms. Sachs did nothing. RS1-6-137-24, 25, 28-29.

Ms. Sachs described Ms. Faxus as "one of these gentle women" who used a loud voice only when "usually singing". RS1-6-137-26. Apparently not singing, Ms. Sachs heard Ms. Faxus "embroiled in a shouting match" with Ms. Gomez, and intervened. RS1-6-137-26-27-31, 55-57. According to Ms. Sachs, she and Ms. Grimsley investigated, and Ms. Gomez denied their allegations of wrongdoing. RS1-6-137-26-31, 57; RS1-3-134-117; RS1-6-137-153-54. So they told Ms. Faxus to

"cut off communication, to not, to not interact with Ms. Gomez from that point on." RS1-6-137-26-31, 57; RS1-3-134-117; RS1-6-137-153-54.

Petitioner filed charges of assault against Ms. Faxus, later including Ms. Sachs, which the School Board police concluded were unsubstantiated. RS1-3-134-115-16; RS1-6-137-226-32-33, 154-55.

In 1996, Petitioner filed a second EEOC discrimination charge. RS1-3-134-43-45, 74. She was, thereafter, involuntarily transferred to a third school in South Miami. RS1-3-13-43-45, 74. The EEOC dismissed Ms. Gomez's charges and issued two right to sue letters on her first and second charges.

Mr. Alejandro Borbolla, her new Principal, informed Petitioner, on August 22, 1997, in writing that her services, effective immediately, would no longer be needed at the Miami Coral Park Adult Center. RS1-3-134-33-34, 46-48; RS1-6-137-82-83, 93, 97. Petitioner had held that night job since 1978, which, together with her day job, provided $27,000 in annual earnings. RS1-3-134-33.

Mr. Borbolla justified Ms. Gomez's termination as budgetary, permitting him to retain solely certified media specialists. RS1-6-137-91, 100-02. But Mr. Borbolla admitted:

> Well, I didn't ask [Ms. Gomez if she was certified], but if I had one already certified, there was no need for another person.
>
> Even though [Ms. Gomez] had been already certified, I could only afford one at that time. RS1-6-137-103.

Before terminating Petitioner, Mr. Borbolla also looked at Ms. Gomez's personnel file, containing, according to Ms. Courtney, Petitioner's discrimination charges and some of her discrimination complaints. RS1-6-137-106; RS1-7-138-124. Mr. Borbolla worked closely with Mr. Machado. RS1-6-137-95, 97.

REASONS FOR GRANTING THE WRIT

This case is a timely opportunity for this Court to resolve the conflicting interpretations of two Supreme Court standards as they are applied to retaliation cases. First, this case involves the artificially heightened, threshold evidentiary burden that a plaintiff must carry as a condition precedent to jury consideration of evidence of less-than-ultimate adverse employment actions in a hostile environment retaliation claim. The decision below is at odds with *Faragher, Ellerth Oncale* and the decisions of other circuits. The decision below prevents the jury, in hostile environment retaliation cases, from considering less-than-ultimate adverse employment evidence in all but those cases in which a plaintiff satisfies a "threshold level of substantiality", itself undefined.

Second, this case involves the standard for establishing discriminatory intent in a multiple-motive pretext case of retaliation that misapprehends *Price Waterhouse* and *Hicks*. The decision below prevents the jury, notwithstanding an established *prima facie* case, from considering multiple motives for retaliation through straightforward consideration of the pretextual nature of a defendant's stated non-discriminatory reasons for certain adverse acts. Instead, it requires a plaintiff to prove "untrue", even where multiple motives are at issue, each of a defendant's multiple, stated non-discriminatory reasons, one layered upon the other, rather than proving whether the discriminatory reason was the motivating one.

I. A "Threshold Level of Substantiality" as a Condition Precedent to Jury Consideration of "Less-Than-Ultimate" Retaliation Claims — Where a Rule 50 Motion Has Already Been Denied — Frustrates *Faragher, Ellerth* and *Oncale*, Conflicts with Other Circuits, and Unnecessarily Muddies an Already-Confusing Area of the Law.

Though the district court denied the Respondent's motion and renewed motion for judgment as a matter of law because of evidentiary sufficiency, the court of appeals concluded that an

instruction limiting adverse employment actions to "ultimate" ones was harmless because Petitioner's evidence of "unfair acts of co-employees and other inconveniences . . . [we]re insufficient to state a claim under the anti-retaliation provision. App. A at 4a. The court of appeals cited its earlier decision in *Wideman*, where it first raised, but never defined, the "threshold level of substantiality" test.[4] App. A at 4a. In so doing, the court of appeals elevated the hurdle for jury consideration of the very kind of hostile environment retaliation evidence under Title VII that this Court reaffirmed in *Oncale*[5] as evidence giving rise to Title VII liability.

> We have held that this *not only* covers "terms" and "conditions" in the narrow contractual sense, but "evinces a congressional intent to strike at *the entire spectrum of disparate treatment* of men and women in employment." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64, 106 S. Ct. 2399, 2404, 91 L. Ed. 2d 49 (1986) (citations and internal quotation marks omitted). "When the workplace is permeated with *discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated.*" *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 370, 126 L. Ed. 2d 295 (1993) (citations and internal quotation marks omitted).

This Court separated in *Faragher* and *Ellerth* "tangible employment actions" also giving rise to Title VII liability.

> A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with

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4. *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1456 (11th Cir. 1998).

5. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78 (1998) (emphasis added).

> significantly different responsibilities, or a decision causing a significant change in benefits.[6]

It follows that jury's can now consider all of this evidence in a Title VII retaliation claim.

Indeed, the majority of the circuits now consider less-than-ultimate employment decisions as retaliation evidence, without a plaintiff having to meet the Eleventh Circuit's heightened, "substantiality" burden mentioned in no other circuit. As the Eleventh Circuit expressly recognized in its earlier *Wideman* decision:[7]

> the First, Ninth, and Tenth Circuits have all held that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions. *See Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994) (stating that actions other than discharge are covered by Title VII's anti-retaliation provision and listing as examples, "employer actions such as demotions, *disadvantageous transfers or assignments*, refusals to promote, unwarranted negative job evaluations and *toleration of harassment by other employees*.") (internal citation omitted); *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir.1987) (holding that such non-ultimate employment decisions as "*[t]ransfers of job duties* and undeserved performance ratings, if proven, would constitute 'adverse employment decisions' cognizable under" Title VII's anti-retaliation provision); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984-86 (10th Cir. 1996) (construing Title VII's anti- retaliation provision to reach beyond ultimate employment decisions and protect an employee from a malicious prosecution action

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6. *Burlington Industries v. Ellerth*, 524 U.S. 742, 761 (1998); *see Faragher v. City of Boca-Raton*, 524 U.S. 775 (1998).

7. *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1456 (11th Cir. 1998) (emphasis added).

> brought by former employer). In addition, the D.C. Circuit has held that the Age Discrimination in Employment Act's anti-retaliation clause, which is identical to Title VII's, "does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion." *Passer v. American Chem. Soc'y*, 935 F.2d 322, 331 (D.C. Cir. 1991). *See also, Welsh v. Derwinski*, 14 F.3d 85, 86 (1st Cir. 1994) (stating that the ADEA's anti-retaliation provision covers more than discharge, demotion, or failure to promote and that a "case by case review" is necessary to determine whether an employer's actions rise to the level of adverse employment actions for purposes of stating a *prima facie* case of retaliation).
>
> We join the majority of circuits which have addressed the issue and hold that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions.

The problem is that the majority of the circuits consider hostile environments and co-worker harassment as retaliation evidence, with no additional showing, apart from the *prima facie* case, of "substantiality"as an added condition precedent to jury deliberation on that class of evidence.[8] Meaning, the actual

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8. *See also Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994) (per curiam) (citing 3 Arthur Larson & Lex K. Larson, Employment Discrimination § 87.20, at 17-101 to 17-107 (1994), which includes among adverse employment actions, "toleration of harassment by other employees" as example of retaliatory activity); *de la Cruz v. New York City Human Resources Admin. Dep't of Social Servs.*, 82 F.3d 16, 21 (2d Cir. 1996) (transfer to a less prestigious job with little opportunity for professional growth arguably altered the terms and conditions of employment and was an adverse employment action in a Title VII discrimination action); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1299 (3d Cir. 1997) (Third Circuit will permit plaintiff to (Cont'd)

conflict among circuits and with this Court's prior decisions lies not in the recognition of hostile environment retaliation claims. But in the class and quantum of evidence of adverse employment actions that the circuits are divergently defining to allow jury consideration. It lies in the added, artificial evidentiary burden uniquely imposed by the Eleventh Circuit requiring "substantiality" before a jury is allowed to consider a claimant's already-adduced evidence of primarily less-than-

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(Cont'd)
maintain retaliation claims when her "status as an employee" has been adversely affected); *Torre v. Casio, Inc.*, 42 F.3d 825, 831 n.7 (3d Cir. 1994) (allegation of transfer to dead-end job sufficient to create material fact issue of adverse employment action); *Knox v. State of Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996) ("No one would question the retaliatory effect of many actions that put the complainant in a more unfriendly working environment. . . . Nothing indicates why a different form of retaliation — namely, retaliating against a complainant by permitting her fellow employees to punish her for invoking her rights under Title VII — does not fall within the statute."); *Collins v. Illinois*, 830 F.2d 692, 704 (7th Cir. 1987) (transfer an adverse employment action where the transfer was really a demotion; employee lost her office and her professional listing as a library consultant); *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1264 (10th Cir. 1998) ("Co-worker hostility or retaliatory harassment, if sufficiently severe, may constitute 'adverse employment action' for purposes of a retaliation claim."). *But see Munday v. Waste Management of North America*, 126 F.3d 239, 243 (4th Cir. 1997) (holding that employer's instructions to ignore or spy on employee who engaged in protected activity do not constitute "adverse employment action" absent evidence that terms, conditions or benefits of employment were adversely affected), *cert. den'd*, 522 U.S. 1116 (1998); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir.) (requiring employer action in the nature of an "ultimate employment decision" such as those concerning "hiring, granting leave, discharging, promoting, and compensating"), *cert. den'd*, 522 U.S. 932 (1997); *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995) (same); *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997) (rejecting theory and instead requiring "tangible change in duties or working conditions that constituted a material employment disadvantage").

ultimate adverse employment decisions to prove a hostile environment retaliation case.

The Eleventh Circuit imposes a "threshold level of substantiality" that is, itself, nowhere defined in *Wideman*, its progeny or in this decision below. By conditioning entitlement to a hostile environment retaliation jury instruction on an undefined, "we know when we see it" "substantiality" standard, the decision below wipes out jury consideration of an entire class of evidence, absent extraordinary cases, in the full spectrum of unlawful Title VII conduct and statements that *Ellerth*, *Faragher* and *Oncale* intended to make clear were actionable.

Under the language and intent of *Ellerth*, *Faragher* and *Oncale*, evidence of unchecked or supervisory indifference to retaliatory co-worker harassment, time scrutiny and docking, involuntary transfers, and removal of the tools to do one's job entitles a claimant to jury deliberation on these less-than-mediate "adverse employment decisions".

The effect of this "substantiality" condition precedent is also born out by the court of appeal's additional erroneous conclusion that Petitioner did not overcome a "plain error" standard of review in challenging the district court's failure to give her proffered jury instruction, concluding there was a "paucity of evidence" to support her theory. App. A at 5a.

But Petitioner adduced the following types of less-than-ultimate retaliation evidence, only summarized here, that should have, under *Oncale*, *Faragher* and *Ellerth*, entitled her to her proffered jury instruction: (Initial Brief at 9-26) (1) It was unrebutted Ms. Gomez had no problems at work from 1978 until 1992. RS1-3-134-33-34; (2) After filing her first EEOC charge of discrimination and retaliation, for discrimination and retaliation, her work environment changed, R1-3-134-42, 139, including the removal of her job responsibilities. RS1-3-134-42; (3) Mr. Machado admitted they decided to eventually reduce Ms. Gomez's work responsibilities. RS1-5-136-33-34; (4) Ms. Gomez complained that Mr. Rambo threatened her with a knife. RS1-5-136-35; (5) Before her complaints in 1992, Ms. Gomez

had many responsibilities throughout the building, with access and keys to the entire building to do her job as an audiovisual specialist. RS1-3-134-42-43; RS1-3-134-32-33, 50-51; (6) Ms. Gomez's access to the building was, post-complaints, limited and her keys to everything, though an Audiovisual Specialist, were removed. RS1-3-134-43, 106; (7) Mr. Machado was "well aware" that Ms. Gomez had filed an EEOC complaint. RS1-5-136-43; RS1-5-136-49; (8) Vivian Pazos, who supervised Ms. Gomez, had executed an affidavit in response to Ms. Gomez's EEOC 1993 charge of discrimination. RS1-5-136-74-75; (9) Petitioner was twice involuntary transferred for reasons having *nothing* to do with her performance. RS1-6-137-128; (10) Ms. Gomez was directed in 1994 to transfer involuntarily from the Coral Park Highschool to Ruben Dario Middle School. RS1-3-134-44-45; RS1-6-137-119; RS1-3-134-128; RS1-5-136-103-04; (11) Ms. Connie Sachs, now-retired media specialist supervisor at Ruben Dario Middle School, knew she had a pending EEOC charge of discrimination against the School Board. RS1-6-137-15-17, 41; RS1-6-137-41, 77-80; (12) The involuntary transfer to Ruben Dario changed Ms. Gomez's hours, caused her to work later in the day, and interfered with her Worker's Compensation doctor appointments for her on-the-job injuries. RS1-3-134-45, 138; (13) At Ruben Dario, Ms. Sachs transferred some of the other staff members' duties to Ms. Gomez to create a position "temporarily" "in order for [Ms. Gomez] to have something to do". RS1-6-137-17-18, 42 70, 72; (14) Ms. Gomez "would be [at Ruben Dario] until they chose to put her somewhere else." RS1-6-137- 42, 52; RS1-6-137-139-40; (15) After her 1996 EEOC discrimination charge, Ms. Gomez was involuntarily transferred *again* to a third school in South Miami. RS1-3-134-43-45, 74; (16) It was also unrebutted Ms. Gomez had been a union steward for ten years; the School Board had never before 1992 scrutinized or docked her time for union business. RS1-3-134-54-60, 66-67, 101-02; (17) Mr. Machado did not dock the time of another union steward attending union business. RS1-5-136-75-77, 79; (18) Ms. Gomez testified Ruben Dario Principal, Ms. Grimsley, admitted

the stated policy was not to dock time for these activities, but she would do so anyway. RS1-3-134-54-58-59; RS1-6-137-171-75; RS1-7-138-189-90; (19) Post-complaints, the School Board docked and mis-classified Ms. Gomez's time for her day job from December 22, 1992 forward on two hundred and thirty-six (236) different occasions. RS1-3-134-54-77, 91, 109-11; (20) Ms. Courtney admitted an employee's unused vacation days were compensable. RS1-7-138-115.

Katherine Gomez's petition for writ of certiorari should be granted because the opinion below conflicts with this Court's important prior rulings clarifying hostile environment evidence as being the full spectrum of evidence under Title VII. It should also be granted because conflicting decisions among and within the circuits on what kind and quantum of evidence constitute hostile environment retaliation evidence are proliferating. The need for this Court's guidance on the contours of hostile environment retaliation evidence is acute.

II. A Verdict Form Forcing a Multiple-Motive Pretext Discrimination Case into a "Bipolar" Framework Conflicts with *Hicks*, Confuses *Price Waterhouse*, and Other Circuits Reject It.

Petitioner filed an amended request for special verdict that simply tracked the language of this Court's prior decisions in *McDonnell-Douglas-Burdine-Hicks*. R2-88-1-2.

> Do you find by a preponderance of the evidence that the Defendant DADE COUNTY SCHOOL BOARD's [sic] has retaliated against the Plaintiff KATHERINE GOMEZ? Initial Brief at 26-27; R2-88-1-2.

The School Board's proposed special verdict did not.

> Has Katherine Gomez carried her burden to show that the School Board took an adverse ultimate employment action against her because she complained of discrimination (and if the School Board provides a non-discriminatory reason for its

> action, has Gomez shown that reason to be untrue)? Initial Brief at 26-27; R2-94-1.

The decision below rejected Petitioner's argument, under *Hicks*, that the School Board's verdict question was error in a multiple-motive retaliation case. And the court of appeals concluded there was no error and no jury confusion because Petitioner "offered no direct evidence that an illegitimate criterion was a substantial factor in the decision" to retaliate against her. App. A at 6a n.3.

The problems is that, by requiring a plaintiff unable to produce direct evidence to carry "her burden to show that . . . Gomez show[ed] that [non-discriminatory reason for its action] to be untrue" in a multiple-motive case, the verdict form defeats the intended simplicity of the *McDonnell-Douglas-Burdine* framework for proving "pretext" discrimination cases in multiple-motive pretext cases like *Hicks*.[9] It also misapprehends *Price Waterhouse*[10] and "mixed motives" in retaliation cases.

In *McDonnell Douglas Corp. v. Green*,[11] this Court first set forth the order of proof in disparate treatment cases, and elaborated on the framework in *Burdine*.[12] The *Burdine* decision described the process:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a *prima facie* case of discrimination. Second, if the plaintiff succeeds in proving the *prima facie* case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.' [*McDonnell Douglas*, 411 U.S.], at 802. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true

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9. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

10. *Hopkins v. Price Waterhouse*, 490 U.S. 228 (1989).

11. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

12. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

reasons, but were a pretext for discrimination. *Id.* at 804.[13]

Burdine belabored the employer's "*true*" reason for the discharge.[14] So the opinion was cast in "bi-polar", "either-its-discriminatory-or-its-not" terms. Post-*Burdine* cases reaffirmed that "either-or" refinement.[15]

So the pre-*Price Waterhouse* jurisprudence "assumed . . . that a single impulse move[d] the employer who discriminate[d]".[16] It also assumed that all disparate treatment claims could be analyzed under a *Burdine* "either-or" pretext framework. But these decisions never suggested that this Court foreclosed liability under a pretext analysis when more than one cause motivated an adverse employment decision and a plaintiff could disprove only one of them. These decisions only suggested that the employment discrimination cases coming before the Court were advanced under a *Burdine* "either-or" pretext framework.

Price Waterhouse[17] changed that employment discrimination liability landscape, and did so for both pretext and mixed-motive cases. In *Price Waterhouse*,[18] the Court's opinions focused on the nature of the causal connection

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13. *Burdine*, 450 U.S. at 252-53.

14. *See id.* at 256.

15. *See, e.g., N.L.R.B. v. Transportation Management Corp.*, 462 U.S. 393, 400 n.5 (1983) ("The [*Burdine*] Court discussed only the situation in which the issue is whether either illegal or legal motives, but not both, were the 'true' motives behind the decision"); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983) ("a plaintiff prevail[s] when at the third stage of a Title VII trial he demonstrates that the legitimate, nondiscriminatory reason given by the employer is in fact not the true reason for the employment decision") (Blackmun, J., concurring).

16. *See* Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C. L. Rev. 1, 47 (1990).

17. 490 U.S. at 228.

18. *Id.*

mandated by the use of the phrase "because of" in Title VII. The *Price Waterhouse* Justices differed on whether "because of" meant that the discriminatory consideration must be a "but-for" cause (i.e., one without which the adverse employment action would not have been taken) or only that it must have "played a motivating part" in the decision to take that action.[19] Justices Brennan, Marshall, Blackmun, and Stevens read the statute as imposing liability in any situation where the unlawful motive was a "motivating" factor, but recognized an "affirmative defense" where the employer showed that the same actions would have been taken in the absence of the unlawful motive.[20] But pertinent to retaliation claims, all members of the *Price Waterhouse* Court agreed that "because of" did not mean "solely because of."[21]

There is no question that the Justices concurring in the judgment in *Price Waterhouse* declined to apply the rules for allocating the *McDonnell-Douglas-Burdine* burdens of production and persuasion to the facts then before them. They viewed those cases as "pretext" cases and the case before them as a "mixed motives" case. But today, in response to the evolution of employment discrimination law as applied, an overwhelming majority of the courts of appeal reject the "sole cause" or "sole factor" formulation in pretext cases as well.[22]

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19. *See id.* at 244 (plurality opinion); *id.* at 262-63 (O'Connor, J., concurring in the judgment).

20. *Id.* at 244-45 (later amended by the 1991 Civil Rights Act codified at 42 U.S.C. § 2000e-2(m) as to non-retaliation cases).

21. *See, e.g., id.* at 241 (plurality opinion); *id.* at 284 (Kennedy, J., dissenting).

22. *See, e.g., Loeb v. Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir.1979); *Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033, 1039 (2d Cir. 1993) (Title VII retaliation violation occurs when "retaliatory motive plays a part in [the discharge], . . . whether or not it was the sole cause . . . [or] when an employer is motivated by retaliatory animus, even if valid objective reasons for the discharge exist."); *Montana v. First Fed. Savs. & Loan Ass'n*, 869 F.2d 100, 105 (2d Cir. 1989) (similar); *Purcell*

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This Court's decision in *Hicks*[23] further supports formal rejection of a bipolar, "either-its-a-discriminatory-motive-or-its-not" framework for pretext cases. *Hicks* made clear that the trier of fact in a pretext case was not limited to choosing between *either* finding that the alleged discriminatory motive *or* the employer's nondiscriminatory explanation was the true and only reason for the employment action.

In *Hicks*, the plaintiff, an African-American, was demoted and ultimately discharged by his employer. He brought suit under Title VII, asserting that the employer's actions were the result of racial animus. The employer insisted it took these actions because the plaintiff had allowed his subordinates to break institutional rules *and* because plaintiff threatened his superior.[24] The district court found at bench trial that the threatening conduct and rules violations had occurred, but concluded that neither these events nor the plaintiff's race was ***the real reason*** for plaintiff's demotion and discharge.[25] "[A]lthough [the] plaintiff ha[d] proven the existence of a crusade to terminate him, he [had] not proven that the crusade was racially rather than personally motivated."[26]

But the Eighth Circuit ruled, analyzing pretext cases as bipolar, which this Court rejected, once the plaintiff proved the employer's proffered reasons were pretextual, he was entitled

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v. Seguin State Bank & Trust Co., 999 F.2d 950, 955 (5th Cir. 1993) (similar); *Blackwell v. Sun Elec. Corp.*, 696 F.2d 1176, 1181-82 (6th Cir. 1983) (similar); *Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035, 1038 (7th Cir. 1993) (similar); *Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1338, 1343-44 (9th Cir. 1987), *cert. den'd*, 484 U.S. 1047 (1988) (similar); *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1425 & n.3 (10th Cir. 1993) (similar). *But see Foster v. University of Arkansas*, 938 F.2d 111, 115-16 (8th Cir. 1991).

23. *Hicks*, 509 U.S. at 502.

24. *See Hicks v. St. Mary's Honor Ctr.*, 756 F. Supp. 1244, 1246-48 (E.D. Mo. 1991).

25. *Id.* at 1252 (emphasis added).

26. *Id.*

to judgment as a matter of law.[27] This Court reversed because the trier of fact's rejection of the employer's proffered reason for its action did not compel the singular conclusion that race was the sole cause of the employment action.[28] This Court said the record evidence supported *three* possible causes that the factfinder still retained the discretion to decide: race, threats and violations of his employer's rules, *and* personal animosity. Because the district court had concluded the explanation advanced by the employer was a pretext, it could have also inferred, this Court said, that there was an impermissible motive to hide.[29]

So, the opinion below conflicts with this Court's opinion in *Hicks* because it affirms a bipolar verdict form in a multiple-motive pretext case. Where the record will support it, the jury retains the discretion not to accept as reflecting the whole truth *either* party's arguments and justifications. As in *Hicks*, this may take the form of a jury conclusion that the alleged discrimination and the employer's nondiscriminatory explanation both played a role in the employer's decision, but that the discriminatory reason was the motivating one. So a verdict form that requires a discrimination claimant to prove *untrue each and every one* of a defendant's proffered non-discriminatory reasons — before a jury can find liability — imposes an artificial and unrealistic standard, where sophisticated employers are far more adept today at couching discriminatory motives in neutral terms than those two decades ago, and equipped to find fault with and manufacture a "paper trail" of employment violations for even the most perfect and devoted of employees.

Additionally, the opinion below, approving the School Board's verdict form, disregarded *Hicks*' reaffirmance that " '[n]o additional proof of discrimination [wa]s required' " to

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27. *Hicks v. St. Mary's Honor Ctr.*, 970 F.2d 487, 492 (8th Cir.1992).

28. *Hicks*, 509 U.S. at 511-13.

29. *Id.*

support a finding of intentional discrimination.[30] While "rejection of the defendant's proffered reasons" did not compel judgment for the plaintiff as a matter of law, it also did not defeat a finding for the plaintiff.[31] So, once the court ruled, as it did here, that Petitioner presented sufficient evidence to support her *prima facie* case, RS1-7-138-194, then the ultimate question that the jury was to decide was whether the School Board unlawfully retaliated against her.

Burdine[32] has already said once the defendant produced its proffered non-discriminatory reason, "the trier of fact proceeds *to decide the ultimate question*: whether plaintiff has proved 'that the defendant intentionally discriminated against [her]' *because of* [complaints of discrimination]".[33] Here the jury instruction and verdict form undermined the intent of *McDonnell-Douglas-Burdine-Hicks* when it used the words, "shown that [nondiscriminatory] reason to be untrue", by grossly oversimplifying the shifting burden of proof premised on a bipolar framework in a multiple-motive set of facts that were not "either-or".[34]

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30. *Id.* (quoting *Hicks v. St. Mary's Honor Center*, 970 F.2d at 487) (emphasis added) (bracketed material in original)).

31. *Hicks*, 509 U.S. at 511.

32. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

33. *Hicks*, 509 U.S. at 511.

34. Even in cases where the evidence may support the use of this bipolar test to describe the plaintiff's burden as harmless error, there is still no reason why a trial court should use it. In most discrimination cases that get to the jury, the record will support an inference that both a legitimate and an illegitimate reason played a role in the employer's decision. The jury instruction and verdict form should provide for the practical reality that the jury will find the employer's decision to be the result of many considerations. Even in those unique cases today where the evidence suggests only a bipolar choice, these verdict forms misstate the law and hold a potential for creating a misunderstanding in the minds of the jury that could be easily addressed by using the standard this Court has repeatedly articulated in *McDonnell-Douglas-Burdines-Hicks*.

As a practical matter, a verdict question is supposed to be simple enough to present a discrimination issue simply. By superimposing ten stated non-discriminatory reasons and requiring a plaintiff to prove each of those to be untrue, an employer heightens the burden of proof in a multiple motive pretext case. It was never the intent of *McDonnell-Douglas-Burdines-Hicks* to require a jury in a multiple-motive pretext case to sort through and determine "untrue" each of an employer's proffered discriminatory reasons, before it can ever reach the actual question — whether retaliation was the motivating reason. It also makes it far too tempting for a jury, faced with all of the stated non-discriminatory reasons, to simply throw up its hands and infer that any employee accused of so many non-discriminatory deficiencies and unable to disprove all of them must have deserved what she got.

The opinion below also misapprehends multiple-motive pretext cases to mean that, where there is more than one motive, the case may only be analyzed outside a bipolar framework as a mixed-motive if a claimant adduces direct evidence of an illegitimate criterion. App. A at 6a. But this Court in *Aikens*[35] acknowledged that rarely will discriminatory intent be proven with direct "smoking gun" evidence, and indirect, circumstantial evidence is probative of discrimination.

> In sum, . . . whatever doubt *Burdine* might have created was eliminated by *Aikens*. There we said, in language that cannot reasonably be mistaken, that "the ultimate question [is] discrimination vel non." (Citation omitted). Once the defendant "responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the factfinder must then decide" not (as the dissent would have it) whether that evidence is credible, but "whether the rejection was discriminatory within the meaning of Title VII." (Citation omitted). At that stage, we said,

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35. *Aikens*, 460 U.S. at 716.

> "the District Court was . . . in a position *to decide the ultimate factual issue in the case," which is "whether the defendant intentionally discriminated against the plaintiff.*" (Citation omitted) . . ."[T]he district court has before it all the evidence it needs to decide" *not* (as the dissent would have it) *whether defendant's response is credible, but "whether the defendant intentionally discriminated against the plaintiff.*" (Citation omitted). "On the state of the record at the close of the evidence, the District Court in this case should have proceeded to *this specific question directly*, just as district courts decide disputed questions of fact in other civil litigation." (Citation omitted).[36]

The opinion below affirms an inherently deceptive verdict form that confuses the *McDonnell-Douglas-Burdines-Hicks* standard in a multiple-motive case because it requires a jury to answer a verdict question asking for the "one" — and only one — "true reason" for an employer's conduct, rather than simply the motivating, discriminatory one. The opinion below conflicts with *Hicks* by requiring pretext plus *direct evidence* of discrimination in this verdict form, in lieu of Ms. Gomez's proposed special verdict form asking the jury what *Hicks* instructs: "the trier of fact proceeds to decide the ultimate question: whether plaintiff has proved 'that the defendant intentionally discriminated against [her]' because of [complaints of discrimination]".[37]

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36. *Hicks*, 509 U.S. at 518-19.

37. *Hicks*, 509 U.S. at 511.

CONCLUSION

FOR THESE REASONS, Petitioner, KATHERINE GOMEZ, prays that this Court grant a Writ of Certiorari to review the decision of the Eleventh Circuit Court of Appeal.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED MAY 10, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4214
Non-Argument Calendar

D. C. Docket No. 96-2241-CIV-DLG

KATHERINE GOMEZ,

Plaintiff-Appellant,

versus

DADE COUNTY SCHOOL BOARD,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(May 10, 1999)

Before ANDERSON, EDMONDSON and MARCUS, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Katherine Gomez appeals a jury verdict of no liability in a Title VII retaliation action against

her employer, the Dade County School Board (the "County"). No reversible error has been shown; we affirm.

Gomez has been employed by the County since 1978. Beginning in 1992, Gomez complained about the acts of a co-worker. In 1993, and again in 1996, Gomez filed charges of discrimination against the County with the EEOC. On 12 August 1996, Gomez — a non-Hispanic Caucasian female — sued the County alleging four counts of employment discrimination (based on gender, race, national origin, and disability), and one count of retaliation. The County's motion for summary judgment was granted on the disability count; Gomez elected to proceed to trial only on the retaliation count. The jury returned a verdict for the County. Gomez raises several challenges to the jury instructions and special verdict form in her appeal.

When an objection has been made before the district court, we review jury instructions to determine whether the instructions create a "substantial and ineradicable doubt" that the jury was properly guided in its deliberations. *Roberts & Schaefer Co. v. Hardaway Co.*, 152 F.3d 1283, 1295 (11th Cir. 1998). But, to preserve for review an alleged error in the court's jury charge, a party must make its objection known to the district court before the jury retires to consider its verdict. Fed.R.Civ. P. 51. And, a party's objection must "stat[e] distinctly the matter objected to and the grounds of the objection." *Id. See also, Formby v. Farmers & Merchants Bank*, 904 F.2d 627 633 n.10 (11th Cir. 1990) (objecting on one ground does not preserve other, unstated objections for appeal). Absent proper objection, we apply a plain error standard of review; relief under the plain error standard may

be appropriate if the instruction led to an incorrect verdict resulting in substantial injustice. *Wood v. President & Trustees of Spring Hill College*, 978 F.2d 1214, 1218 (11th Cir. 1992).

Gomez first argues that the jury was misled by the district court's instructions on "adverse employment action." The instructions provided that the employment action the County took against the plaintiff

> must have been an ultimate employment decision such as hiring, granting leave, discharging and promoting and compensating.
>
> Hostility and threats from fellow workers do not substitute an ultimate employment decision as to sustain a claim of retaliation.

Citing *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453 (11th Cir. 1998), Gomez contends the district court set an improper legal standard.

Wideman stated "that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions." 141 F.3d at 1456. Gomez, however, did not raise this objection in the district court. Gomez did propose jury instructions that did not limit adverse employment decisions to "ultimate" employment decisions, but no objection to the limitation in the instruction actually given was raised before the district court. And, as Gomez recognizes, the special-interrogatory verdict form repeated use of the word "ultimate;" and still, she made no objection.

Appendix A

Gomez's evidence raised issues that fall within the district court's instruction on ultimate employment acts: termination of her night job and erroneous docking of her pay. By its verdict, the jury rejected these claims. Gomez also raised issues of less than "ultimate" employment acts: unfair treatment by co-workers and certain changes inconveniencing her.[1] Although *Wideman* left open what reprisals short of an ultimate employment decision would be sufficient to constitute an adverse employment act, it recognized that "some threshold level of substantiality that must be met for unlawful discrimination to be cognizable under the anti-retaliation clause." *Wideman*, 141 F.3d at 1456. Without today deciding how much more would be required to meet that threshold of substantially, we conclude that the unfair acts of co-employees and other inconveniences cited by Gomez are insufficient to state a claim under the anti-retaliation clause.

Gomez also claims that her lateral transfer to another school was an adverse employment act. Although the transfer involved no reduction in pay, Gomez argues that under the County's policy all such transfers entail a ninety-day probationary period during which time no promotions may be considered. If this transfer was sufficiently disadvantageous to constitute an adverse employment act (which we do not decide), the jury may have misled the jury some.[2]

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1. Gomez claims her key to the restroom was taken away (although a key is on a hook for everyone to use), that her access to a telephone was limited, and that her computer, which she claimed was defective, was not replaced.

2. We say only that the jury may have been misled. We express no "substantial and eradicable doubt that the jury was misled." If

(Cont'd)

But, given the jury's rejection of the ultimate employment acts advanced by Gomez, the paucity of evidence proffered in support of Gomez's claim, and the County's proffered non-discriminatory reasons for its employment acts, Gomez has not met the standard for plain error relief; no showing that the instruction led to an incorrect verdict resulting in substantial injustice has been made.

Gomez next complains that the instructions and verdict form were erroneous because they saddled the plaintiff with the burden of proving the true reason for the County's acts when, Gomez argues, this was a multi-motive pretext case. The instructions provided that, if Gomez established that she was retaliated against, the burden then falls to the County to produce evidence of a legitimate nonretaliatory reason for its acts. The County

> need not persuade you it was actually motivated by the proffered reasons. If the [County's] evidence raises a genuine issue that it did not retaliate against plaintiff, then the plaintiff must show that the reasons proffered by the [County] were not the true reasons.
>
> The plaintiff, however, at all times retains the burden of persuading you that she was retaliated against.

(Cont'd)
Gomez had introduced evidence that she suffered a tangible consequence from being on probation following the transfer, that is, she was not considered for a promotion for which she otherwise would have been definitely considered, the "ultimate" employment act instruction would have allowed the jury to find in her favor.

And, the verdict form provided: "if the [County] provides a non-discriminatory reason for its action, has Gomez shown that reason to be untrue?"

Gomez's challenge on appeal to the jury instruction and verdict form on this issue appears to be different from that raised in the district court. But, even assuming the challenge she raises was preserved for appeal, we find no reversible error. These instructions did not parrot the shifting burdens of production and persuasion of *McDonnell Douglas Corp. v. Green*, 93 S.Ct. 1817 (1973) in a complicated fashion. No terminology beyond the jury's ready understanding was employed. We discern no serious risk that the jury was confused or misled. If the jury found an adverse employment act and if, as Gomez now contends, this case is a "multi-motivation" case,[3] the instructions allowed the jury to render a verdict for Gomez by finding that the County's nonretaliatory explanations were not the true reasons for its adverse employment act. The jury saw the facts otherwise.

Gomez also alleges reversible error in the district court's failure to define "causal connection" in its instructions.

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3. Gomez offered no "direct evidence that an illegitimate criterion was a substantial factor in the decision." *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775, 1804 (1989) (O'Connor, J., concurring). No sufficient showing has been made that retaliation was a "motivating" or "substantial" part of the adverse employment decision; *Price Waterhouse*'s "mixed motive" analysis does not apply. *See Raskin v. Wyatt Co.*, 125 F.3d 55, 61 (2d Cir. 1997) (to invoke *Price Waterhouse* mixed-motive analysis, plaintiff must "produce a smoking gun' or at least a 'thick cloud of smoke' to support his allegations of discriminatory intent.")

Gomez requested language defining causal connection using formulations borrowed from caselaw examining causal connection in the context of establishing a prima facie case. The district court declined use of the language in the context of jury instructions. We are cited to no authority supporting Gomez's entitlement to a jury instruction defining causal connection as she requested. Absent contrary authority, and given the trial court's broad discretion in formulating jury instructions, *see Carter v. DecisionOne Corp.*, 122 F.3d 997, 1005 (11th Cir. 1997), no reversible error is present here.

We have also considered Gomez's challenge to the district court's ruling excluding evidence more than 300 days preceding the 26 July 1993 filing of her EEOC complaint; no reversible error has been shown.

AFFIRMED.

United States Court of Appeals
For the Eleventh Circuit

Appendix A

No. 98-4214
Non-Argument Calendar

District Court Docket No. 96-2241-CIV

KATHERINE GOMEZ,

Plaintiff-Appellant,

versus

DADE COUNTY SCHOOL BOARD,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Before ANDERSON, EDMONDSON and MARCUS, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

Appendix A

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: May 10, 1999
For the Court: Thomas K. Kahn,
Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: **OCT 05 1999**

APPENDIX B — SPECIAL VERDICT AND FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED AND FILED DECEMBER 16, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 96-2241-CIV-GRAHAM

KATHERINE GOMEZ,

Plaintiff,

v.

DADE COUNTY SCHOOL BOARD,

Defendant.

SPECIAL VERDICT
[F.R.C.P. Rule 49(A)]

1. Has Katherine Gomez carried her burden to show that the School Board took an adverse ultimate employment action against her because she complained of discrimination (and if the School Board provides a non-discriminatory reason for its action, has Gomez shown that reason to be untrue)?

ANSWER: YES ___ NO X

Appendix B

If your answer to Questions No.1 is "No", then do not answer any more questions on this Special Verdict Form. Instead, the Foreperson should sign the form and the jury should return it to the Court.

If your answer to Questions No. 1 is "Yes", please answer Questions No. 2 or 3 below.

2. What sum of money, if any, do you find, more likely than not, would compensate the plaintiff for damages which she sustained as a result of Defendant's actions?

   a. Indicate amount due Plaintiff, if any, for back pay. $_____

   b. Indicate amount due Plaintiff, if any, for other compensatory damages. $ _____

3. If you have not inserted a sum of money, in response to Question No. 2, you must award plaintiff $1.00 in nominal damages by inserting that amount in the following space:

   FOR NOMINAL DAMAGES: $ _____

s/ [illegible] 12/16/97
FOREPERSON'S SIGNATURE DATE

Appendix B

DONE AND ORDERED this January 12, 1998, in Chambers, at Miami, Florida.

s/ Linnea R. Johnson
LINNEA R. JOHNSON
UNITED STATES MAGISTRATE JUDGE

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 96-2241-CIV-GRAHAM

KATHERINE GOMEZ

Plaintiff,

vs.

DADE COUNTY SCHOOL BOARD,

Defendant

FINAL JUDGMENT

THIS CAUSE came on for trial before a jury, Magistrate Linnea R. Johnson presiding by agreement of the parties, on Plaintiff's claims pursuant to 42 U.S.C. §2000(e) (Title VII). The issues having been tried and the jury having rendered its verdict in favor of the Defendant School Board, it is hereby

ORDERED AND ADJUDGED that judgment be entered in favor of the Defendant School Board and against the Plaintiff Katherine Gomez and that Plaintiff take nothing by this action. This action is hereby dismissed on the merits and all pending motions are hereby rendered moot. The Court retains jurisdiction to assess any fees or costs which may be appropriate pursuant to a properly filed motion.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED SEPTEMBER 17, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED

No. 98-4214

KATHERINE GOMEZ,

Plaintiff-Appellant,

versus

DADE COUNTY SCHOOL BOARD,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion_____, 11th Cir., 19__, __F.2d__).

Before: ANDERSON, Chief Judge, EDMONDSON and MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the

Appendix C

Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

By: s/ [illegible]
UNITED STATES CIRCUIT JUDGE